STATE OF MICHIGAN

COURT OF APPEALS

SALVATORE A. CAVALIERE,

Plaintiff-Appellant,

v

ANTHONY J. BELLANCA and BELLANCA BEATTIE & DELISLE, PC,

Defendants-Appellees.

UNPUBLISHED
January 10, 2006

No. 264184
Wayne Circuit Court
LC No. 04-412645-NM

Before: O'Connell, P.J., Smolenski and Talbot, JJ.

MEMORANDUM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition on their counterclaim. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff retained defendants to represent him in a divorce action. He falsely claimed, even under oath, that certain assets held in his name were not part of the marital estate because they belonged to his parents. The trial court held that they were marital assets subject to distribution. Plaintiff then sued defendants, claiming that they were negligent in failing to persuade the trial court that the assets were not part of the marital estate because he owned them before the marriage. Defendants filed a counterclaim for nonpayment of fees. The trial court granted judgment for defendants on both plaintiff's complaint and their counterclaim; only the latter ruling is at issue here.

We review the trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

First, plaintiff contends that the trial court erred in granting defendants' motion simply because he had not prevailed on his malpractice claim. We disagree. Although evidence of malpractice may be offered in defense to an action for payment for services rendered, MCL 600.2912(2), plaintiff failed to answer the counterclaim and did not claim a right of setoff based

on defendants' malpractice. Therefore, the defense was waived.[1] MCR 2.111(F)(3)(b). In addition, setoff is generally a matter in equity, *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997). Defendants apparently did not pursue a claim that the assets were plaintiff's premarital property because plaintiff perjured himself in claiming that certain assets belonged to his parents and were not part of the marital estate. Public policy, therefore, precludes plaintiff from profiting from his own wrongful conduct. *Orzel v Scott Drug Co,* 449 Mich 550, 559-560; 537 NW2d 208 (1995).

Next, plaintiff contends that the trial court erred in granting defendants' motion because defendants failed to comply with MCR 2.113(F)(1) by failing to attach a copy of the retainer agreement to their counterclaim, and thus failed to state a claim for relief. Plaintiff, however, failed to include this issue in his statement of questions presented on appeal; thus, we decline to address it.[2] *Busch v Holmes,* 256 Mich App 4, 12; 662 NW2d 64 (2003).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

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[1] Even if plaintiff had not waived the affirmative defense of malpractice, this defense lacked merit. The trial court clearly stated that there was no malpractice:

> I ruled that there was no malpractice by the act by granting summary disposition for the Defendant. I ruled there was no malpractice. What the facts are here is Mr. Cavaliere did not want to pay his wife in the divorce. He delayed, he delayed, he delayed. The Macomb Circuit Court entered a judgment, gave the wife fifty five percent, himself forty five, Mr. Cavaliere forty five percent. Mr. Cavaliere didn't want to pay his wife in the divorce and now he doesn't want to pay his lawyer. The Court will grant the Defendant's motion, the Defendant and Counter-Plaintiff, I should say, . . . and award a judgment . . . .

Moreover, plaintiff failed to provide a transcript from the court's ruling on the previous motion to show that the trial court spoke in error.

[2] Although this Court may consider an issue if it is one of law and the record is factually sufficient, *Van Buren Charter Twp v Garter Belt, Inc,* 258 Mich App 594, 632; 673 NW2d 111 (2003), we note that the retainer agreement was appended to defendants' request for admissions and plaintiff expressly admitted that was an accurate copy of the retainer agreement he signed. Thus, were we to rule in favor of plaintiff, we would simply delay the inevitable, given that defendants could then seek leave to amend, which would undoubtedly be granted. MCR 2.116(I)(5).